90-837

Supreme Court, U.S.
FILED
NOV 26 1990
JOSEPH F. SPANIOL, JR.
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No. 90- _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DOMINGO ANTONIO LAGOS, a/k/a Mingo,
a/k/a Tony,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Was joinder of the defendant with two other defendants for trial proper under Rule 8(b) of the Rules of Criminal Procedure?

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PETITION FOR WRIT OF CERTIORARI

STATEMENT OF JURISDICTIONAL GROUNDS

This is a petition, filed pursuant to 28 U.S.C. § 1254, for a writ of certiorari requesting that the Court review a decision of the United States Court of Appeals for the Fourth Circuit.[1] Judgment was entered in the Fourth Circuit on August 28, 1990.

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[1] The Fourth Circuit Court of Appeals considered a consolidated appeal involving the petitioner, Domingo Antonio Lagos, and two others, Gregory Thomas Gamber and Kevin Wesley Doggett.

The decision was not published. A copy is included in the appendix filed herein.

STATEMENT OF THE CASE

Petitioner ("Lagos") was tried at the district court level with two other defendants, Gregory Thomas Gamber and Kevin Wesley Doggett. The trial arose out of two separate indictments. (13a, 15a). The first indictment involved multiple charges and multiple defendants, including Lagos and Gamber. The second indictment concerned only Doggett. These indictments were joined for trial over objection of Lagos and the other defendants. The indictment charging Lagos alleged both specific acts and a conspiracy. The substantive count against Lagos charged a violation of 21 U.S.C. § 841(a)(1). The conspiracy, charged under 21 U.S.C. § 846 and § 841(b)(1)(a), was alleged to have begun on or about April 1983, and continued up to about September 1988. The overt acts alleged against Lagos in this conspiracy supposedly occurred between August 1, 1986 and March or April, 1988.

The factual background for each of the three defendants was different. With respect to Lagos, his involvement allegedly began, according to the indictment, on or about August 1, 1986. The indictment alleged eight overt acts of Lagos:

1. He possessed with intent to distribute approximately one pound of cocaine.
2. He, along with Bernard Connelly and one other person, discussed the distribution of cocaine in North Carolina on or about October 29, 1986.
3. In early 1987, he asked another person to assist him in the distribution of cocaine.

4. He and another person traveled from Greensboro, North Carolina to Hilton Head Island, South Carolina and met Bernard Connelly on or about July 15, 1987.

5. In Miami, Florida, from August 3, 1987 to August 11, 1987, he, along with Bernard Connelly and Mary Lagos, awaited the arrival of a quantity of cocaine.

6. On or about March 3, 1988, Mary Lagos introduced another person to Lagos for the purpose of negotiating a cocaine transaction.

7. On or about March 7, 1988, Lagos and another person discussed a three-kilogram cocaine transaction.

8. On or about April 12, 1988, in Miami, Florida, Lagos and Mary Lagos questioned other persons and continued to negotiate for the distribution of three kilograms of cocaine.

(15a, numbers 17, 20, 23, 24, 25, 27, 28, 29). None of the overt acts alleged against Lagos involved either Doggett or Gamber.

Both indictments were returned on September 27, 1988. Following the Government's motion to join the two indictments, the trial court ordered that the cases be joined. (25a). A joint trial of Lagos, Gamber and Doggett, among others, began on April 10, 1989. Lagos was convicted on April 21, 1989 and sentenced in August 1989. Lagos gave notice of appeal to the United States Court of Appeals for the Fourth Circuit. Following the filing of briefs and oral argument, the Court of Appeals affirmed the conviction on August 28, 1990. (1a).

ARGUMENT

LAGOS WAS IMPROPERLY JOINED WITH GAMBER AND DOGGETT FOR TRIAL.

After the indictments were issued, the government moved to join the Doggett indictment to the Gamber-Lagos one for trial. Lagos, Doggett and Gamber all resisted that motion, and made motions of their own alleging improper joinder of the different defendants. Lagos' motion included suggestions not only that the Doggett case was improperly joined with the Gamber-Lagos indictment, but also that the many defendants in the Gamber-Lagos indictment should not have been joined together. Moreover, Lagos, along with Gamber and Doggett, moved to sever the many different charges and to strike a number of allegations from the indictment, because those allegations related to conspiracies separate and apart from the one in which Lagos was alleged to be involved.

Joinder of multiple defendants is controlled by Rule 8(b) of the Federal Rules of Criminal Procedure, which reads:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Fed. R. Crim. P. 8(b).

Traditionally, the propriety of a motion for joinder under Rule 8(b) is determined on the face of the in-

dictment; absent some suggestion of prosecutorial bad faith, the court does not go behind the allegations of the indictment to determine propriety of joinder. *U.S. v. Sanders*, 563 F.2d 379 (8th Cir. 1977); *U.S. v. Nettles*, 570 F.2d 547 (5th Cir. 1978). Conspiracy cases make this simple rule problematic because an indictment can allege a common nexus, conspiracy, between defendants in conclusory fashion without tying them together by factual allegations. Therefore, a prosecutor can easily tie wholly unrelated cases together merely by alleging some common scheme or conspiracy.

In order to protect against such improper joinder, the Fifth Circuit has modified the "face of the indictment" approach for joinder in conspiracy cases. In *United States v. Levine*, 546 F.2d 658 (5th Cir. 1977), the Fifth Circuit said

> In absence of an argument of prosecutorial bad faith, (citation omitted), allegations of an indictment will be accepted as true in deciding a Rule 8(b) motion . . . where, however, the defendant can show that the charge of a joinder of defendants in conspiratorial action is based on a legal interpretation that is improper, the Court cannot base its 8(b) ruling on the written words alone but must determine if, under correct legal theory, joint action was actually involved.

Levine, 546 F.2d at 663. In other words, in a conspiracy case, where the basis for joinder is only a conspiracy count, the indictment must show "some interaction between the conspirators as to at least one common illegal object." *Levine*, 546 F.2d at 662,

663; *U.S. v. McDaniels*, 57 F.R.D. 171 (4th Cir. 1972) ("it is necessary that there be some evidence that there was in fact a joint or common plan before joinder can be effected under 8(b)"); *U.S. v. Lindell*, 881 F.2d 1313 (5th Cir. 1989) ("to determine whether an indictment charges separate conspiracies or a single conspiracy, we consider whether the alleged facts reveal a substantive identity of facts or participation.") There must be a single conspiracy in which all defendants are members. The Fourth Circuit erred by ignoring *Levine* and its own ruling in *McDaniels*.

The indictments are the focus of the consideration of the propriety of joinder. The Doggett and Gamber-Lagos indictments allege six different substantive counts. Two of those counts relate to Doggett and no other named persons. Those counts arose on January 31 and February 1, 1984. Two other counts relate to Gamber. Those are Counts Two and Three of the Gamber-Lagos indictment, with events which occurred on or about January 20, 1986 and May 1, 1986. Lagos is charged in Count Four of the Gamber-Lagos indictment with an event which occurred on or about August 1, 1986. Lagos is not named as an actor in either the Doggett or Gamber substantive counts. The different substantive counts are separate offenses which could not be joined in a single trial absent the government's conspiracy theory. However, analysis of the conspiracy charge in the Gamber-Lagos indictment shows that Lagos is not named in any overt acts which include either or both Gamber and Doggett. There is no "substantial identity of facts or participants" justifying joinder.

The *Levine* case arose from a fact situation very similar to the facts of the instant case. *Levine* in-

volved multiple defendants and different substantive counts alleging different actions which sometimes included different people. In *Levine*, the different substantive counts, absent the conspiracy allegation, could not have been joined in a single indictment because they related to different factual matrices and implicated different defendants at different times. The requisite necessary identity of facts or participants was not present and joinder was improper. *Levine*, 546 F.2d at 662.

The Levine court deemed the conspiracy charge "ubiquitous." *Id.* The Lagos conspiracy charge is equally omnipresent and overreaches to provide an alleged common link between otherwise unrelated transactions. The indictment in the present case shows no common plan and actually shows three separate conspiracies. Lagos, Doggett and Gamber were not involved together in a single conspiracy. The first conspiracy is described in the first three overt acts of the Gamber-Lagos indictment, all of which relate to events involving Doggett, Roberto Rangel and Martha Zappia in 1983 through mid-February 1984. The indictment does not allege that Lagos (or Gamber) knew about these activities or participated.

The second of the conspiracies appearing on the face of the indictment is overt acts 4 through 19, except for items 14, 15 and 17. Those events appear to have begun about a year and a half after the events alleged in items 1 through 3, with no acts alleged for the interim. This second conspiracy allegedly began when Diane Gamber, the wife of the defendant Gamber, asked another person to assist her in obtaining a source of supply for cocaine. According to the allegations, she recruited Joaquin Gonzalez as that

source, and thereafter, until about July 1986, she and others, including her husband, were involved in a transportation scheme to bring cocaine to Greensboro and distribute it.

As with the first, Lagos does not appear at all in the second conspiracy. His conspiracy is the third one appearing in the indictment, beginning in about August 1986. This third conspiracy centers around the activities of Lagos and Bernard Connelly, and is alleged at overt acts numbers 17-20, 23-25 and 27-29. The indictment alleges that Lagos and Connelly picked up cocaine in Miami and distributed it in Greensboro, North Carolina.

The indictment simply does not factually connect Lagos with Gamber and Doggett. The only connection is the conspiracy count. A conspiracy count cannot rectify otherwise improper joinder. *U.S. v. Luna*, 585 F.2d 1 (1st Cir. 1978). The government cannot be allowed to try three unrelated defendants by the use of a conspiracy count not based in fact.

Joinder is not discretionary. *U.S. v. Hatcher*, 680 F.2d 438, 441 (6th Cir. 1982). Misjoinder requires reversal unless it can be shown that misjoinder was harmless error. *U.S. v. Lane*, 474 U.S. 438, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986). The indictment actually contained three separate conspiracies. Lagos was only connected to the third conspiracy and was not linked to either Doggett or Gamber by the facts contained in the indictment. Lagos was extremely prejudiced by the introduction of evidence relating to the possible guilt of Doggett and Gamber because such evidence had nothing to do with Lagos. Because of the introduction of this evidence linking Lagos to conspiracies in which he was not involved, the misjoinder was not

harmless error. In affirming this misjoinder, the Fourth Circuit has erroneously sanctioned a departure by the trial court of the accepted and usual manner of deciding joinder questions.

CONCLUSION

Because of the prejudice resulting from misjoinder, Lagos' petition for writ of certiorari must be granted.

This the 26th day of November, 1990.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNPUBLISHED

No. 89-5207

UNITED STATES OF AMERICA,
Plaintiff—Appellee,

versus

DOMINGO ANTONIO LAGOS,
a/k/a Mingo, a/k/a/ Tony,
Defendant—Appellant.

No. 89-5211

UNITED STATES OF AMERICA,
Plaintiff—Appellee,

versus

GREGORY THOMAS GAMBER,
Defendant—Appellant.

No. 89-5219

UNITED STATES OF AMERICA,
Plaintiff—Appellee,

versus

KEVIN WESLEY DOGGETT,
Defendant—Appellant.

Appeals from the United States District Court for the Middle District of North Carolina, at Greeensboro. N. Carlton Tilley, Jr., District Judge. (CR-88-138-G, CR-88-137-G)

Argued: July 20, 1990 **Decided:** August 28, 1990

Before ERVIN, Chief Judge, and PHILLIPS and MURNAGHAN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ARGUED: David James, SMITH, PATTERSON, FOLLIN, CURTIS, JAMES & HARKAVY, Greensboro, North Carolina; Marshall Hurley, PATTON BOGGS & BLOW, Greensboro, North Carolina; Gordon Hampton Brown, BLACKWELL, BLACKWELL, CANADY & THORNTON, Winston-Salem, North Carolina, for Appellants. David Bernard Smith, Assistant United States Attorney, Senior Litigation Counsel Greensboro, North Carolina, for Appellee. **ON BRIEF:** Bryan E. Lessley, SMITH, PATTERSON, FOLLIN, CURTIS, JAMES & HARKAVY, Greensboro, North Carolina; C.Allen Foster, PATTON, BOGGS & BLOW, Greensboro, North Carolina, for Appellants. Robert H. Edmunds, Jr., United States Attorney, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Domingo Antonio Lagos, Gregory Thomas Gamber and Kevin Wesley Doggett appeal from their respective convictions on various drug charges, contending that: (1) Doggett's prosecution violated the double jeopardy and due process clauses of the Constitution; (2) the cases against Lagos, Gamber and Doggett were improperly joined prior to trial; (3) the cases against Lagos, Gamber and Doggett, if properly joined prior to trial, should have been severed thereafter; (4) the trial court improperly admitted certain telephone billing records; (5) the trial court improperly admitted certain testimony tending to show "guilt by association"; (6) there was insufficient evidence to support Doggett's conviction; and (7) the evidentiary errors and errors of joinder were not harmless. Because these arguments lack merit, we affirm the judgments below.

I. Introduction

The co-defendants in this case conspired to funnel large quantities of cocaine from Columbia through Miami to Greensboro and beyond. While the conspiracy was somewhat less focused or directed than we normally encounter in drug cases, there is no doubt in our minds that there existed a collaborative effort on the part of the defendants and their associates to secure and distribute cocaine. The salient facts of this case will be interspersed throughout our discussion of the issues raised on appeal.

II. Double Jeopardy

The fifth amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb. . ." As this court noted in *United States v. Ragins*, 840 F.2d 1184, 1187 (4th Cir. 1988), the double jeopardy clause protects defendants against cumulative punishments and successive prosecutions for the same offense. The critical question in cases raising the issue of successive prosecutions, such as this case, is whether any

of the new offenses charged against the defendant are the "same" as those charged against him in a prior indictment. *Id.* at 1188. As a general rule, "the second prosecution is barred by double jeopardy if the evidence actually used to prosecute the first offense would suffice to convict of the second offense as charged." *Id.*; *see also Jordan v. Virginia*, 653 F.2d 870, 873 (4th Cir. 1980). With respect to the burden of proof in double jeopardy cases, this court has stated:

> [A]lthough the defendant has the initial burden of going forward with the evidence by putting his double jeopardy claim in issue, once he has made a non-frivolous showing that an indictment charges him with an offense for which he was formerly placed in jeopardy, the burden of establishing that there were two separate crimes shifts to the government. Because double jeopardy is not an element of the crime but rather a personal privilege, the government need only prove that there were in fact two separate offenses by a preponderance of the evidence.

Ragins, 840 F.2d at 1192.

In 1985, Doggett was indicted on the following charges: (1) conspiracy to distribute cocaine hydrochloride in violation of 21 U.S.C. §§ 841(a)(1) and 846 (from approximately September 1983 until October 1984); (2) possession with intent to distribute and distribution of cocaine hydrochloride in violation of 21 U.S.C. § 841(a)(1) (on or about August 20, 1984); (3) conspiracy to defraud the United States of a sum in excess of $10,000 in violation of 18 U.S.C. § 371 (from about December 1983 until October 1984); and (4) concealing and covering up a material fact within the jurisdiction of a federal department or agency in violation of 18 U.S.C. § 1001, and 31 U.S.C. §§ 5313(1) and 5322(b) (on or about August 24, 1984 and October 4, 1984).

The present indictment charged Doggett on two new counts: (1) travelling in interstate commerce from Greensboro to Miami with an intent to promote, manage, establish, carry on, or facilitate any of those endeavors with respect to an unlawful activity involving controlled substances in violation of 18 U.S.C. § 1952(a)(3) (on or about January 31, 1984); and (2) possession of cocaine hydrochloride with an intent to distribute in violation of 21 U.S.C. § 841(a)(1) (on or about February 1, 1984).

On appeal, Doggett maintains that these two new counts charged him with the same offense as did the drug conspiracy count in the 1985 indictment. We disagree. First, this court has held that "a conspiracy to commit an offense and the substantive offense underlying the conspiracy are distinct crimes which do not merge into a single punishable act, and a defendant in a proper case can be prosecuted both for the conspiracy and the substantive offense." *United States v. Walker*, 796 F.2d 43, 46 (4th Cir. 1986). This is precisely what occurred in the instant case where Doggett was prosecuted for conspiracy under the 1985 indictment, and for possession with an intent to distribute cocaine on two distinct occasions under both the 1985 and the 1988 indictments.

Second, the proof required under the racketeering provision of 18 U.S.C. § 1952(a)(3) is substantially different from that required under the conspiracy provision of 21 U.S.C. § 846. Accordingly, the factual inquiries conducted in each of the two prosecutions were quite dissimilar, and do not raise double jeopardy concerns. Moreover, the racketeering violation, like the possession counts, constitutes a substantive offense which may be charged apart from and in addition to the conspiracy allegations. In short, Doggett has failed to make a non-frivolous showing of double jeopardy as required by this court's decision in *Ragins*.

III. Joinder

Logos, Gamber and Doggett also contend that the district court erred in allowing the government to prosecute them jointly. Under Federal Rule of Criminal Procedure 13, a district court "may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information." In addition, Rule 8(b) provides that "[t]wo or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or tansactions constituting an offense or offenses."

As a general proposition, the joinder of parties under these rules contributes considerably to the efficiency of judicial administration. *United States v. Spitler*, 800 F.2d 1267, 1271 (4th Cir. 1986); *United States v. Shuford*, 454 F2d 772, 776 (4th Cir. 1971). Nevertheless, trial courts may not join totally unconnected defendants and offenses. *Ingram v. United States*, 272 F.2d 567, 569 (4th Cir. 1959), *cited in United States v. Chinchic*, 655 F.2d 547, 550 (4th Cir. 1981). Thus, defendants may not be indicted or tried together absent a common act or transaction. *Id.* It should be noted, however, that joinder is almost always appropriate in cases involving co-conspirators and aider-abettors. *United States v. Leavis*, 853 F.2d 215, 218 (4th Cir. 1988); *Spitler*, 800 F.2d at 1271.

In this case, joinder was appropriate because of the existence of common actors, including unindicted co-conspirators and abettors, common methods and plans, common and shared goals, common overt acts in furtherance of the alleged conspiracy, and common witnesses. Upon our review of the record, we cannot say that the district court erred in permitting the joinder of the three defendants in this case.

IV. Severance

Motions for a severance under Federal Rule of Criminal Procedure 14 are committed to the sound discretion of the district courts. *United States v. Tedder*, 801 F.2d 1437, 1450 (4th Cir. 1986), *cert. denied*, 480 U.S. 938 (1987); *United States v. Spitler*, 800 F.2d 1267, 1271 (4th Cir. 1986); *United States v. Spoone*, 741 F.2d 680, 688 (4th Cir. 1984), *cert. denied*, 469 U.S. 1162 (1985); *United States v. Truslow*, 530 F.2d 257, 261 (4th cir. 1975); *United States v. Shuford*, 454 F.2d 772, 776 (4th cir. 1971). Ordinarily, severances should be granted in cases where a joint trial would cause a substantial degree of prejudice. *Truslow*, 530 F.2d at 261; *Shuford*, 454 F.2d at 776. The defendant, however, has the burden of demonstrating such strong prejudice. *United States v. Goldman*, 750 F.2d 1221, 1225 (4th Cir. 1984).

In addition, it is not sufficient for the defendants merely to show that joinder rendered the defense more difficult or that separate trials offered a better chance of acquittal. *Id.*; *Spitler*, 800 F.2d at 1271. Nor are severances justified by differences in trial strategy among the co-defendants, or by conflicting and inconsistent defenses. *United States v. Whitehead*, 618 F. 2d 523, 529 n.11 (4th Cir. 1980); *United States v. Becker*, 585 F.2d 703, 707 (4th Cir. 1978), *cert. denied*, 439 U.S. 1080 (1979). To obtain a severance based on conflicting defenses, a defendant must demonstrate that the conflict is irreconcilable, and that the jury unjustifiably will infer as a result of the conflict that all of the defendants are guilty. *Spitler*, 800 F.2d at 1272; *Becker*, 585 F.2d at 707.

In this case, none of the defendants demonstrated that their joint trial resulted in a substantial degree of prejudice or otherwise interfered with their individual defense strategies. Accordingly, the district court did not abuse its discretion in denying their motions for severance.

V. Telephone Records

Next, the appellants maintain that the district court improperly admitted certain telephone billing records as further evidence of the conspiracy. They claim that this evidence should have been excluded under Federal Rule of Evidence 403. Under that rule, district courts may exclude otherwise relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." However, a decision under Rule 403 is committed to the discretion of the trial court, whose judgment will not be disturbed absent an arbitrary or irrational exercise of that discretion. *Garraghty v. Jordan*, 830 F.2d 1295, 1298 (4th cir. 1987); *United States v. Pennello*, 668 F.2d 789, 790 (4th Cir. 1982).

In this case, the district court admitted the telephone records as circumstantial evidence of the alleged conspiracy. Upon examination of the record, it does not appear that this evidentiary ruling was either arbitrary or irrational. Moreover, the district court issued a limiting instruction to the jury at the time these records were introduced into evidence,[1] and the defendants raised no

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[1] The court advised the jury as follows:

> Ladies and gentlemen, we are about to hear evidence of telephone toll records. Now telephone toll records are records that you may see on a monthly basis when you get your bill each month that details the numbers that have been called from your phone or numbers that have been received at your phone. The evidence adduced by telephone toll records is something that you should look at with some care and circumspection; because, as you know, telephone toll records do not identify who placed the call. They merely identify numbers to which a call may have been made or attempted. Neither do they identify who received the call on the other end of the line. Nor do the telephone toll records identify the substance of any conversation that took place during that call.

objections at that time. Thus, it appears that the defendants have waived their right to object to this evidence on appeal.

VI. Guilt by Association

The defendants' next argument is that the district court improperly admitted certain evidence which they claim did nothing more than establish their "guilt by association." Accordingly, they claim that this evidence was more prejudicial and misleading than probative of a material fact, and that it also should have been excluded under Federal Rule of Evidence 403.

We agree with the government that, although evidence of an association among co-conspirators is alone insufficient to establish the existence of a criminal conspiracy, it is a relevant factor which may be considered by the jury. *See United States v. Williford*, 764 F.2d 1493, 1500 (11th Cir. 1985); *United States v. Harrell*, 737 F.2d 971, 978 (11th Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985); *United States v. Cannington*, 729 F.2d 702 (11th Cir. 1984). Furthermore, the district court in this case did provide a limiting instruction on the use of the challenged testimony.[2]

> There has been testimony in this case that at the residence where some of these numbers were located or subscribed to that several people lived. Whatever use you make of these records will be up to you and your understanding of the evidence in the case. You may consider these records for whatever weight you determine to give them.

Joint Appendix at 1278-79.

[2] The court informed the jury that the mere presence at the scene of a transaction or event and the mere fact that certain persons may have associated with each other and may have assembled together and discussed common aims and interests does not establish proof of a conspiracy. A person who has no knowlege of a conspiracy but who happens to act in a way which advances some purpose of one does not thereby become a conspirator.
Joint Appendix at 864-65.

VII. Sufficiency of the Evidence

Next, Doggett contends that the evidence adduced at trial was insufficient to support his convictions. As this court noted in *United States v. Tresvant*:

> The guidelines for reviewing the sufficiency of evidence to support a conviction are quite familiar. The relevant question is not whether the appellate court is convinced of guilt beyond a reasonable doubt, but rather whether, viewing the evidence in the light most favorable to the government, *any* rational trier of facts could have found the defendant guilty beyond a reasonable doubt. We must consider circumstantial as well as direct evidence, and allow the government the benefit of all reasonable inferences from the facts proven to those sought to be established

677. F.2d 1018, 1021 (4th Cir. 1982) (emphasis in the original) (citations omitted), *cited in United States v. MacDougall*, 790 F.2d 1135, 1151 (4th Cir. 1986), and *United States v. Jones*, 735 F.2d 785, 791 (4th Cir.), *cert. denied*, 469 U.S. 918 (1984).

To obtain a conviction under 18 U.S.C. § 1952(a)(3), the government must establish that the defendant (1) travelled in interstate commerce or used facilities in interstate commerce (2) with the specific intent to further an unlawful activity (3) after which the defendant performed or attempted to perform acts in furtherance of the unlawful activity. *United States v. Schocket*, 753 F.2d 336, 340-41 (4th Cir. 1985). To obtain a conviction under 21 U.S.C. § 841(a)(1), the government must show that the defendant knowingly possessed a controlled substance with the intent to distribute it. *United States v. Crockett*, 813 F.2d 1310, 1316 (4th Cir.), *cert. denied*, 484 U.S. 834 (1987).

Viewing the direct and circumstantial evidence in the light most favorable to the government, and allowing the

government to draw all reasonable inferences therefrom, it is conceivable that a rational trier of fact could have found Doggett guilty of these two offenses beyond a reasonable doubt. The following evidence was presented at trial: the testimony of Giovanni Contrereas, who stated that he and Doggett had travelled from Greensboro to Miami and back again, Contrereas by car and Doggett by plane, in order to obtain cocaine from a third party in Miami and transport it to Greensboro for distribution; and an Eastern Airlines customer flight coupon in Doggett's name for a January 30, 1984, flight from Greensboro to Miami via Atlanta. While this may not constitute overwhelming evidence of guilt, it is adequate to sustain Doggett's convictions.

VIII. Harmless Error

It is axiomatic that the duty of a reviewing court is to consider the trial record as a whole and to ignore errors which are harmless because there can be no such thing as a perfect, error-free trial, and the Constitution does not guarantee such a trial. *United States v. Hasting*, 461 U.S. 499 (1983). This responsibility is propounded in our governing laws and rules. *See* 28 U.S.C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."); Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). In *Hasting*, the Supreme Court indicated that an appellate court should apply the harmless error rule in all cases where the error is deemed harmless beyond a reasonable doubt. 461 U.S. at 508-10. Thus, the essence of the harmless error rule is that a judgment may stand only when there is no reasonable possibility that the practice complained of might have contributed to the conviction. 461 U.S. at 506. In *Alston v. Garrison*, 720 F.2d 812, 817 (4th

Cir. 1983), *cert. denied*, 468 U.S. 1219 (1984), this court, citing *Hasting*, stated that the proper inquiry was whether, viewing the entire record, it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty absent the allegedly harmless error.

Applying the foregoing standard of review to the facts of the present case, we believe that all of the errors alleged by the defendants are harmless.

IX. Conclusion

For the reasons articulated above, we hereby affirm the convictions of Lagos, Gamber and Doggett.

AFFIRMED

[SEALED]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

CR-88-137-01-G

UNITED STATES OF AMERICA

V.

KEVIN WESLEY DOGGETT

FILED

SEP 27 1988

IN THIS OFFICE
Clerk, U.S. District Court
Greensboro, N. C.

By /s/ bab
W-S

The Grand Jury charges:

COUNT ONE

On or about January 31, 1984, KEVIN WESLEY DOGGETT did travel in interstate commerce from Greensboro, in the State and Middle District of North Carolina, to Miami, in the State of Florida, with the intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of an unlawful activity, said unlawful activity being a business enterprise involving controlled substances, in violation of the laws of the United States, Title 21, United States Code, Section 841(a)(1), and thereafter did perform and attempt to per-

form acts to promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on of said unlawful activity; in violation of Title 18, United States Code, Section 1952(a)(3).

COUNT TWO

On or about February 1, 1984, in the County of Guilford, in the Middle District of North Carolina, KEVIN WESLEY DOGGETT willfully, knowingly and intentionally did unlawfully possess with intent to distribute approximately two kilograms of cocaine hydrochloride, a Schedule II, narcotic controlled substance within the meaning of Title 21, United States Code, Section 812; in violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL:

/s/ Q. E. Purry
FOREMAN

/s/ Robert H. Edmunds Sr.
UNITED STATES ATTORNEY

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

CR-88-138-01-G
CR-88-138-02-G
CR-88-138-03-G
CR-88-138-04-G
CR-88-138-05-G
CR-88-138-06-G
CR-88-138-07-G
CR-88-138-08-G
CR-88-138-09-G
CR-88-138-10-G
CR-88-138-11-G
CR-88-138-12-G
CR-88-138-13-G

UNITED STATES OF AMERICA

V.

MIGUEL LUNA, LUIS JOAQUIN GONZALES-VOHORQUES, DOMINGO ANTONIO LAGOS, also know as Mingo and Tony, ROBERTO CABALLERO RANGEL, also know as "Beto," DIANA MARIA CABALLERO RANGEL GAMBER, GREGORY THOMAS GAMBER, BERNARD MICHAEL CONNELLY, also known as Kenneth Paul Crawford, CARLOS CABEZA, LUIS EMIRO BARRERA, MARTHA HELENA MATIZ, MARTHA CABALLERO RANGEL ZAPPIA, MARY ELIZABETH FULLER LAGOS, CARLOS RUIZ-BLONCO

FILED

SEP 27 1988

IN THIS OFFICE
Clerk, U. S. District Court
Greensboro, N. C.
By /s/ bab
W-S

The Grand Jury charges:

COUNT ONE

Prior to in or about April, 1983, the exact to the Grand Jurors unknown, and continuing up to and including September, 1988, in the Middle District of North Carolina, the District of South Carolina, the Southern District of Florida, the District of Arizona, Colombia, South America, and elsewhere, MIGUEL LUNA, LUIS JOAQUIN GONZALES-VOHORQUES, DOMINGO ANTONIO LAGOS, also known as Mingo and Tony, ROBERTO CABALLERO RANGEL, also known as "Beto," DIANA MARIA CABALLERO RANGEL GAMBER, GREGORY THOMAS GAMBER, BERNARD MICHAEL CONNELLY, also known as Kenneth Paul Crawford, CARLOS CABEZA, LUIS EMIRO BARRERA, MARTHA HELENA MATIZ, MARTHA CABALLERO RANGEL ZAPPIA, MARY ELIZABETH FULLER LAGOS, CARLOS RUIZ-BLONCO, and divers other persons, known and unknown to the Grand Jurors, knowingly and intentionally did unlawfully conspire, combine, confederate and agree together and with each other to commit offenses against the laws of the United States, that is:

1. To knowingly, intentionally, and unlawfully possess with intent to distribute multiple-kilogram quantities of cocaine hydrochloride, a Schedule II, narcotic controlled substance, within the meaning of Title 21, United States Code, Section 812, in violation of Title 21, United States Code, Section 841(a)(1).

2. To knowingly, intentionally, and unlawfully distribute multiple-kilogram quantities of cocaine hydrochloride, a Schedule II, narcotic controlled substance, within the meaning of Title 21, United States Code, Section 841(a)(1).

All in violation of Title 21, United States Code, Sections 846 and 841(b)(1)(A).

OVERT ACTS

In furtherance of the aforesaid conspiracy and to effect the objects and purposes thereof, MIGUEL LUNA, LUIS JOAQUIN GONZALES-VOHORQUES, DOMINGO ANTONIO LAGOS, also know as Mingo and Tony, ROBERTO CABALLERO RANGEL, also known as "Beto," DIANA MARIA CABALLERO RANGEL GAMBER, GREGORY THOMAS GAMBER, BERNARD MICHAEL CONNELLY, also known as Kenneth Paul Crawford, CARLOS CABEZA, LUIS EMIRO BARRERA, MARTHA HELENA MATIZ, MARTHA CABALLERO RANGEL ZAPPIA, MARY ELIZABETH FULLER LAGOS, CARLOS RUIZ-BLONCO, and others committed numerous overt acts in the Middle District of North Carolina and elsewhere, including but not limited to the following:

1. In or about late April, 1983, in Greensboro, in the State and Middle District of North Carolina, ROBERTO CABALLERO RANGEL, also known as "Beto," received two kilograms of cocaine for distribution.

2. In or about late May, 1983, in Hialeah, Florida, MARTHA CABALLERO RANGEL ZAPPIA delivered two kilograms of cocaine to another person for transportation to Ramiro Contreras Lagos and Kevin Wesley Doggett in Greensboro, in the State and Middle District of North Carolina.

3. In or about mid-February, 1984, in Greensboro, in the State and Middle District of North Carolina, ROBERTO CABALLERO RANGEL, also known as "Beto," and another

person discussed the distribution of one kilogram of cocaine.

4. In or about late 1985 or early 1986, in Greensboro, in the State and Middle District of North Carolina, DIANA MARIA CABALLERO RANGEL GAMBER asked another person to assist her in obtaining a source of supply for cocaine.

5. In or about early 1986, DIANA MARIO CABALLERO RANGEL GAMBER returned to Greensboro, in the State and Middle District of North Carolina, and told another person that her source of supply for cocaine was LUIS JOAQUIN GONZALES-VOHORQUES.

6. In or about early 1986, in Greensboro, in the State and Middle District of North Carolina, LUIS JOAQUIN GONZALES-VOHORQUES, ROBERTO CABALLERO RANGEL, also known as "Beto," CARLOS CABEZA, DIANA MARIA CABALLERO RANGEL GAMBER, and GREGORY THOMAS GAMBER met and discussed cocaine distribution.

7. On or about January 20, 1986, in Greensboro, in the State and Middle District of North Carolina, DIANA MARIA CABALLERO RANGEL GAMBER and GREGORY THOMAS GAMBER possessed with intent to distribute approximately one pound of cocaine.

8. In or about late March, 1986, and early April, 1986, in Greensboro, in the State and Middle District of North Carolina, DIANA MARIA CABALLERO RANGEL GAMBER and other persons discussed the use of apartments in Greensboro and Atlanta, Georgia, for the storage of cocaine.

9. Between March, 1986, and July, 1986, CARLOS CABEZA and/or LUIS JOAQUIN GONZALES-VOHORQUES delivered multiple-kilogram quantities of cocaine to DIANA MARIA CABALLERO RANGEL GAMBER and GREGORY

THOMAS GAMBER in Greensboro, in the State and Middle District of North Carolina.

10. In or about March, 1986, in Greensboro, in the State and Middle District of North Carolina, LUIS JOAQUIN GONZALES-VOHORQUES and MARTHA HELENA MATIZ met with DIANA MARIA CABALLERO RANGEL GAMBER for the purpose of receiving over $100,000 in United States currency.

11. Between early and mid-1986, DIANA MARIA CABALLERO RANGEL GAMBER and MARTHA CABALLERO RANGEL ZAPPIA transported by automobile kilogram quantities of cocaine to ROBERTO CABALLERO RANGEL, also, known as "Beto," in Phoenix, Arizona.

12. In or about mid-1986, MIGUEL LUNA and LUIS JOAQUIN GONZALES-VOHORQUES traveled from Bucaramanga, Colombia, South America, to Bogota, Colombia, South America, and met with a cocaine supplier from Medellin, Colombia, South America.

13. On or about May 1, 1986, in Greensboro, in the State and Middle District of North Carolina, LUIS JOAQUIN GONZALES-VOHORQUES, DIANA MARIA CABALLERO RANGEL GAMBER, and GREGORY THOMAS GAMBER possessed with intent to distribute approximately five kilograms of cocaine.

14. On or about July 4, 1986, in Hilton Head, South Carolina, DIANA MARIA CABALLERO RANGEL GAMBER, GREGORY THOMAS GAMBER, and BERNARD MICHAEL CONNELLY, also known as Kenneth Paul Crawford, discussed cocaine distribution.

15. In or about mid-1986, LUIS JOAQUIN GONZALES-VOHORQUES and another person discussed the transportation of cocaine and monies between Miami, Florida, and Atlanta, Georgia, to Greensboro, North Carolina, via automobile.

16. In or about July, 1986, in Miami, Florida, LUIS JOAQUIN GONZALES-VOHORQUES, CARLOS CABEZA, LUIS EMIRO BARRERA, and CARLOS RUIZ-BLONCO delivered ten kilograms of cocaine to MARTHA HELENA MATIZ.

17. On or about August 1, 1986, in Greensboro, in the State and Middle District of North Carolina, DOMINGO ANTONIO LAGOS, also known as Mingo and Tony, possessed with intent to distribute approximately one pound of cocaine.

18. During the period of August 25, 1986, to September 5, 1986, in Bucaramanga, Colombia, South America, DIANA MARIA CABALLERO RANGEL GAMBER and another person discussed the continuation of cocaine transactions with LUIS JOAQUIN GONZALES-VOHORQUES.

19. On or about October 15, 1986, in Greensboro, in the State and Middle District of North Carolina, ROBERTO CABALLERO RANGEL, also known as "Beto," asked another person to assist him in the distribution of cocaine.

20. On or about October 29, 1986, in High Point, in the State and Middle District of North Carolina, DOMINGO ANTONIO LAGOS, also known as Mingo and Tony, BERNARD MICHAEL CONNELLY, also known as Kenneth Paul Crawford, and another person discussed the distribution of multiple-kilogram quantities of cocaine in the Middle District of North Carolina.

21. On or about April 18, 1987, in Greensboro, in the State and Middle District of North Carolina, $16,850 in United States currency was seized from ROBERTO CABALLERO RANGEL, also known as "Beto."

22. On or about June 19, 1987, in Greensboro, in the State and Middle District of North Carolina, another person obtained an apartment for CARLOS RUIZ-BLONCO at the request of DIANA MARIA CABELLERO RANGEL GAMBER.

23. In or about early 1987, in Greensboro, in the State and Middle District of North Carolina, DOMINGO ANTONIO LAGOS, also known as Mingo and Tony, asked another person to assist him in the distribution of cocaine.

24. On or about July 15, 1987, DOMINGO ANTONIO LAGOS, also known as Mingo and Tony, and another person traveled from Greensboro, in the State and Middle District of North Carolina, to Hilton Head, South Carolina, and met BERNARD MICHAEL CONNELLY, also known as Kenneth Paul Crawford.

25. During the period of August 3, 1987, through August 11, 1987, in Miami, Florida, DOMINGO ANTONIO LAGOS, also known as Mingo and Tony, BERNARD MICHAEL CONNELLY, also known as Kenneth Paul Crawford, MARY ELIZABETH FULLER LAGOS, and others awaited the arrival of a quantity of cocaine.

26. During the period of August 3, 1987, through August 11, 1987, BERNARD MICHAEL CONNELLY, also known as Kenneth Paul Crawford, received several calls from the residence of DIANA MARIA CABALLERO RANGEL GAMBER and GREGORY THOMAS GAMBER in Greensboro, in the State and Middle District of North Carolina.

27. On or about March 3, 1988, in Miami, Florida, MARY ELIZABETH FULLER LAGOS introduced another person to DOMINGO ANTONIO LAGOS, also known as Mingo and Tony, for the purpose of negotiating a multiple-kilogram cocaine transaction.

28. On or about March 7, 1988 DOMINGO ANTONIO LAGOS, also known as Mingo and Tony, and another person discussed a three-kilogram cocaine transaction.

29. On or about April 12, 1988, in Miami, Florida, DOMINGO ANTONIO LAGOS, also known as Mingo and Tony, and MARY ELIZABETH FULLER LAGOS questioned other

persons and continued to negotiate for the distribution of three kilograms of cocaine.

CONCEALMENT PHASE

30. On or about April 11, 1984, in Greensboro, in the State and Middle District of North Carolina, Kevin Wesley Doggett offered another person $700. * * *

31. On or about October 13, 1987, in Greensboro, in the State and Middle District of North Carolina, DIANA MARIA CABALLERO RANGEL GAMBER and another person discussed surveillance of her by the Drug Enforcement Administration, and efforts to conceal $100,000 in United States currency.

32. On or about April 12, 1988, in Miami, Florida, DOMINGO ANTONIO LAGOS, also known as Mingo and Tony, and MARY ELIZABETH FULLER LAGOS interrogated Special Agent David H. Shelton, Drug Enforcement Administration, and Edward Fernandez, Forsyth County Sheriff's Department, both acting in undercover capacities concerning their prior purported cocaine dealings.

33. During April, 1988, in Greensboro, in the State and Middle District of North Carolina, CARLOS RUIZ-BLONCO advised another person that DIANA MARIA CABALLERO RANGEL GAMBER would have that person killed if that person told about her being in the cocaine business.

34. In or about May, 1988, ROBERTO CABALLERO RANGEL, also known as "Beto," told other persons, "You are getting too close to the fire."

35. During the week of May 23, 1988, in Greensboro, in the State and Middle District of North Carolina, DIANA MARIA CABALLERO RANGEL GAMBER accused another person of talking to the police about her activities and offered that person money to leave Greensboro.

* * *

COUNT TWO

On or about January 20, 1986, in the County of Guilford, in the Middle District of North Carolina, DIANA MARIA CABALLERO RANGEL GAMBER and GREGORY THOMAS GAMBER willfully, knowingly and intentionally did unlawfully possess with intent to distribute approximately one pound of cocaine hydrochloride, a Schedule II, narcotic controlled substance within the meaning of Title 21, United States Code, Section 812; in violation of Title 21, United States Code, Section 841(a)(1).

COUNT THREE

On or about May 1, 1986, in the County of Guilford, in the Middle District of North Carolina, LUIS JOAQUIN GONZALES-VOHORQUES, DIANA MARIA CABALLERO RANGEL GAMBER, and GREGORY THOMAS GAMBER willfully, knowingly and intentionally did unlawfully possess with intent to distribute approximately five kilograms of cocaine hydrochloride, a Schedule II, narcotic controlled substance within the meaning of Title 21, United States Code, Section 812; in violation of Title 21, United States Code, Section 841(a)(1).

COUNT FOUR

On or about August 1, 1986, in the County of Guilford, in the Middle District of North Carolina, DOMINGO ANTONIO LAGOS, also known as Mingo and Tony, willfully, knowingly and intentionally did unlawfully possess with intent to distribute approximately one pound of cocaine hydrochloride, a Schedule II, narcotic controlled substance within the meaning of Title 21, United States Code, Section 812; in violation of Title 21, United States Code, Section 841(a)(1).

COUNT FIVE

On or about May 25, 1988, in the County of Guilford, in the Middle District of North Carolina, DIANA MARIA

CABALLERO RANGEL GAMBER knowingly used intimidation toward another person, with the intent to hinder, delay or prevent the communication to law enforcement officers of the United States of information relating to the commission or possible commission of Federal offenses involving controlled substances, in violation of Title 21, United States Code, Section 841(a)(1) and 846; in violation of Title 18, United States Code, Section 1512(b)(3).

A TRUE BILL:

/s/ Q. E. Purry
FOREMAN

/s/ Robert H. Edmunds Sr.
UNITED STATES ATTORNEY

A True Copy
[Illegible]
[Illegible]
[Illegible]
/s/ Carol Hayes
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

CR-88-137-G

UNITED STATES OF AMERICA

V.

KEVIN WESLEY DOGGETT

FILED

JAN 24 1989

IN THIS OFFICE
Clerk, U.S. District Court
Greensboro, N. C.

By _____

ORDER TO JOIN

It appearing to the Court that the above-entitled case was calendared for trial at a session beginning December 12, 1988, and that the Government has filed a Motion for Joinder of Indictments and Defendants for trial with defendants in CR-88-138-G;

Having considered the Government's Motion, and having concluded that the reasons for joinder are valid, that the ends of justice would be served by trying the cases jointly rather than separately and that captioned defendant would not be substantially prejudiced thereby,

IT IS ORDERED that the above-entitled case be joined for trial with case number CR-88-138-G.

This the 24th day of January, 1989.

/s/ Frank W. Bullock, Jr.
UNITED STATES DISTRICT JUDGE